

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 OLYMPIA MASTER BUILDERS, THURSTON
6 COUNTY CHAMBER OF COMMERCE,
7 HINKLE PROPERTIES, INC. d/b/a HINKLE
8 HOMES,

9 Petitioners,

10 v.

11 THURSTON COUNTY,
12

13 Respondent,
14

CASE No. 15-2-0002

FINAL DECISION AND ORDER

15
16 **SYNOPSIS**

17 The Petitioners challenged what they described as substantive and procedural
18 amendments of Thurston County's Critical Area Ordinance (CAO). Specifically, Petitioners
19 alleged the County "implicitly approv[ed] staff implementation" of the "2015 Interim Process"
20 (ISP) addressing Mazama pocket gopher habitat in lieu of the County's adopted CAO
21 regulations. The Board concluded certain aspects of the ISP constituted *de facto*
22 amendments of the CAO, that those changes were made in violation of the requirements of
23 RCW 36.70A.035 and RCW 36.70A.140, and remanded the matter to the County.
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26 **I. INTRODUCTION**

27 The Hearing on the Merits was convened on April 13, 2016, at the Environmental and
28 Land Use Hearings Office in Tumwater, Washington. Present at the hearing were Board
29 Members Nina Carter and Charles Mosher. Presiding officer William Roehl participated by
30 telephone. The Petitioners were represented by Heather L. Burgess and Leslie C. Clark.
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1 Deputy Prosecuting Attorneys Donald R. Peters, Jr. and Elizabeth Petrich represented
2 Thurston County.

3 4 **II. BOARD JURISDICTION**

5 The Board finds the Petition for Review was timely filed pursuant to RCW 36.70A
6 .290(2). The Board finds the Petitioners have standing to appear before the Board pursuant
7 to RCW 36.70A.280(2). Whether the Board has jurisdiction over the subject matter of the
8 Petition for Review pursuant to RCW 36.70A.280(1)(a) is a key, preliminary question and
9 the Board concludes in this order that it does have subject matter jurisdiction.
10

11 **III. BURDEN OF PROOF**

12 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations,
13 and amendments to them are presumed valid upon adoption.¹ This presumption creates a
14 high threshold for challengers as the burden is on the petitioner to demonstrate action taken
15 by the local jurisdiction is not in compliance with the Growth Management Act (GMA).²
16

17 The Board is charged with adjudicating GMA compliance and, when necessary,
18 invalidating noncompliant plans and development regulations.³ The scope of the Board's
19 review is limited to determining whether a local jurisdiction has achieved compliance with
20 the GMA only with respect to those issues presented in a timely petition for review.⁴ The
21 GMA directs that the Board, after full consideration of the petition, shall determine whether
22 there is compliance with the requirements of the GMA.⁵ The Board shall find compliance
23 unless it determines the local jurisdiction's action is clearly erroneous in view of the entire
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28 ¹ RCW 36.70A.320(1) provides: "[Except for the shoreline element of a comprehensive plan and applicable
29 development regulations] comprehensive plans and development regulations, and amendments thereto,
30 adopted under this chapter are presumed valid upon adoption."

31 ² RCW 36.70A.320(2) provides: "[Except when city or county is subject to a Determination of Invalidity] the
32 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
chapter is not in compliance with the requirements of this chapter."

³ RCW 36.70A.280, RCW 36.70A.302.

⁴ RCW 36.70A.290(1).

⁵ RCW 36.70A.320(3).

1 record before the Board and in light of the goals and requirements of the GMA.⁶ In order to
2 find the local jurisdiction's action clearly erroneous, the Board must be "left with the firm and
3 definite conviction that a mistake has been committed."⁷

4 Thus, the burden is on the Petitioners to overcome the presumption of validity and
5 demonstrate the challenged actions taken by Thurston County are clearly erroneous in light
6 of the goals and requirements of the GMA.
7

8 IV. PRELIMINARY MATTERS

9 At the commencement of the Hearing on the Merits, the County moved to
10 supplement the record with three proposed exhibits.⁸ The Petitioners were granted one
11 week to review the motion and file a response, which they did on April 20, 2016.⁹ The
12 Petitioners objected to supplementation with proposed IR 202 and IR 203, did not object to
13 proposed IR 201, and asked the Board to strike from the record all references to IR 202 and
14 IR 203.
15

16 The County's motion to supplement is denied. Denial is based on the timing of the
17 request as well as a lack of relevance. Motions to supplement the record were initially to be
18 filed on or before January 19, 2016. While the Board made an earlier exception, no
19 acceptable justification for filing this second motion on the date of the hearing was provided.
20 Beyond that, the proposed exhibits would not be "necessary or of substantial assistance to
21 the board in reaching its decision", particularly in light of the Board's decision to remand this
22 matter due to the County's violations of RCW 36.70A.035 and RCW 36.70A.140.
23

24 Based on the Board's ruling denying the motion and the Petitioners' request, the
25 three proposed exhibits attached to the Respondent's motion as well as the following
26 portions of the transcript of the Hearing on the Merits related to and referencing those
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28 ⁶ RCW 36.70A.320(3).

29 ⁷ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008) (Citing *Dept. of Ecology v. PUD*
30 *District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993); See also *Swinomish Tribe v.*
31 *WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-
32 98, 139 P.3d 1096 (2006).

⁸ Second Motion to Supplement Index.

⁹ Petitioners' Response to Respondent's Second Motion to Supplement Index and Motion to Strike Index Nos.
202 and 203 from the Record.

1 exhibits shall be stricken: (1) Page 67, lines 4 through 13; (2) Page 73, commencing at line
2 5, through page 74, line 12. All references to proposed IR 201, IR 202, and IR 203 during
3 the Hearing were not considered by the Board in reaching its decision in this matter.

4 5 **V. FACTS**

6 This matter involves four subspecies of the Mazama pocket gopher (MPG), and the
7 relationship between those gophers and their habitat within Thurston County's critical areas
8 ordinance.¹⁰ In Washington State, MPGs live west of the Cascade Mountains and currently
9 can be found in Clallam, Mason, Pierce, and Thurston Counties with three of the subspecies
10 located in Thurston.¹¹ The U. S. Fish and Wildlife Service (USFWS) made it a "candidate"
11 species for listing in 2001.¹² The Washington Department of Fish and Wildlife (WDFW)
12 classified the MPG as threatened in 2006.¹³ In 2012, the County's CAO designated certain
13 prairie habitats as being of local importance and referenced the MPG as one of the species
14 related to such habitats.¹⁴ The Thurston County Code provides that federal candidate
15 species and state listed species and their habitats are protected under the County's CAO,
16 thus including the MPG.¹⁵ The parties agree that the CAO included standards and
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21 ¹⁰ Thurston County had protected prairie habitat and Mazama pocket gophers in its CAO since 1994. Over
22 time, those protections were refined by the 2009 Interim Prairie Conservation Ordinance and a general update
23 of the CAO in 2012. IR 60, p. 1.

24 ¹¹ IR 15, p. 1. IR 182 (Exhibit K attached to PFR) pp. 106, 107.

25 ¹² IR 182 (Exhibit K attached to PFR), p. 106.

26 ¹³ *Id.*

27 ¹⁴ TCC Appendix 24.25-1.

28 ¹⁵ TCC 24.25.065 - Important habitats and species. 24.25.065 - Important habitats and species. Important
29 animal and plant species, their habitats of primary association, and other important habitats protected under
30 this chapter are:

- 31 A. Federally Listed Species and Associated Habitats. Animal and plant species listed under the
32 federal Endangered Species Act (64 FR 14307) as endangered, threatened, or candidates for
listing and their habitats of primary association. (Consult the U.S. Fish and Wildlife Service
and National Marine Fisheries Service for current listings.)
B. State Listed Species and Associated Habitats.
1. Priority species and their habitats of primary association. Priority species identified on the
WDFW Priority Habitats and Species (PHS) List and their habitats of primary association.
(Consult the state department of fish and wildlife for the current PHS list).
2. Priority habitats. Priority habitats identified on the WDFW Priority Habitats and Species
(PHS) List. (Consult the state department of fish and wildlife for the current PHS list).

1 procedures to be followed to identify and condition development projects potentially
2 impacting MPG or their associated habitat.

3 The impetus for the Petitioners' filing of the Petition for Review commencing this
4 matter was action taken by the County, action which has been referred to as the "Interim
5 Process" or "Interim Screening Process" (ISP). The ISP was preceded by an April 9, 2014,
6 determination from the USFWS to list the MPG¹⁶ and its habitat¹⁷ in both Thurston and
7 Pierce counties as "threatened" under the ESA.¹⁸ Beginning soon after the federal listing of
8 the MPG, the County opted to work with the USFWS in performing site reviews required for
9 development applications. In the spring of 2015, the Record shows correspondence from
10 the USFWS to the County¹⁹ and a County staff memorandum directed to the Board of
11 County Commissioners (BOCC).²⁰ The USFWS correspondence to the County included a
12 "recommended approach for the 2015 screening season [for the MPG] . . .".²¹ IR 14 and 15
13 were similarly worded although IR 14 included a list of soil types related to MPG preference
14 and a "recommended" number of site visits and their timing, depending on soil type.²² A
15 May 14, 2015, County planning staff memo to the BOCC acknowledged receipt of USFWS's
16 "new guidance for assessing potential take of MPG . . .". The memo includes the following
17 statement:
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20 "The guidance is a recommended approach for the County to follow to assess
21 impacts on the MPG and provide protection of the gopher as required by this
22 Critical Areas Ordinance."²³

23 It is evident from the Record that the County did commence to work with USFWS
24 following the April 2014 MPG habitat and species ESA listings.²⁴ The cooperative effort
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27 ¹⁶ IR 11, Fed. Reg. Vol. 79, No. 68, April 9, 2014. "We, the [USFWS] . . . determine threatened species status .
28 . . . for . . . the Mazama Pocket Gopher in Thurston and Pierce Counties of Washington State."

29 ¹⁷ IR 12, Fed. Reg. Vol. 79, No. 68, April 9, 2014. "We, the [USFWS] . . . designate critical habitat for three
30 subspecies of the Mazama pocket Gopher . . .". "The effect of this regulation is, therefore, to designate critical
31 habitat for [three subspecies of MPG] found in Thurston County, Washington . . ."

32 ¹⁸ 16 USC Sec. 1533 (b)(2).

¹⁹ IR 15, dated May 13, 2015.

²⁰ IR 60, dated May 14, 2015.

²¹ IR 15, p. 1.

²² IR 14, dated May 28, 2015.

²³ IR 60, p. 1.

1 became more formalized in 2015. Another County staff memo, IR 60, included "Pros and
2 Cons" of either accepting or not accepting the guidance from USFWS and appears to seek
3 direction from the BOCC.²⁵ IR 60 includes six pages detailing the proposed 2015
4 "Screening Process" for MPG.²⁶ Although the Record does not clearly indicate a formal
5 decision by the BOCC to approve use of the recommended 2015 screening process,²⁷ there
6 is no disagreement that the process was implemented.
7

8 VI. LEGAL ISSUES AND ANALYSIS

9 De Facto Amendments

10 The jurisdiction of the Board is limited. RCW 36.70A.280(1) provides, in pertinent
11 part: "The growth management hearings board shall hear and determine only those
12 petitions alleging" that "a state agency, county, or city planning under this chapter is not in
13 compliance with the requirements of this chapter [GMA] . . . or chapter 43.21C RCW [SEPA]
14 as it relates to plans, development regulations, or amendments." (Emphasis added).
15

16 Development regulations control the development and use of land and are defined in
17 the GMA, RCW 36.70A.030(7):
18

19 "**Development regulations**" or "**regulation**" means the controls placed on
20 development or land use activities by a county or city, including, but not limited
21 to, zoning ordinances, critical areas ordinances, shoreline master programs,
22 official controls, planned unit development ordinances, subdivision ordinances,
23 and binding site plan ordinances together with any amendments thereto...²⁸.
(Underlining added)

24 Thus, the GMHB has jurisdiction to hear appeals of local decisions, which among other
25 things, adopt or amend development regulations. In this case, the County did not formally
26 adopt any development regulations. Rather, the Petitioners allege the County's action,
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28 ²⁴ *Id.*, p. 2.

29 ²⁵ *Id.*, 60, pp. 6, 7.

30 ²⁶ *Id.*, Sec 4, pp. 2-7.

31 ²⁷ IR 61, pp. 1, 2; IR 66: "MPG Review Process for 2015: Follow up to briefing on May 14, 2015. Approved
following the new US Fish & Wildlife guidelines."

32 ²⁸ See also WAC 365-196-200 which is worded identically, as well as WAC 365-196-800(1): "Development
regulations under the act are specific controls placed on development or land use activities by a county or
city."

1 implementation of the ISP, amounted to *de facto* amendments of its development
2 regulations.

3 In *Alexanderson v. Board of Clark County Commissioners*²⁹, the Court of Appeals
4 ruled that a Memorandum of Understanding between Clark County and the Cowlitz Tribe for
5 provision of water service to a proposed development was a *de facto* amendment of the
6 County's comprehensive plan policy prohibiting such water service. The Court reversed the
7 Board's dismissal based on a lack of jurisdiction and remanded for a Board decision on the
8 merits. Since that ruling, the Board has taken an "... additional step in determining its
9 jurisdiction where the challenged action is alleged to override provisions of a comprehensive
10 plan and constitute a *de facto* amendment".³⁰
11

12 Here, the Petitioners allege the County's action amounted to *de facto* amendments of
13 development regulations included in the County's CAO, Title 34 of the Thurston County
14 Code. The Board has jurisdiction over the Petitioners' claims if, and only if, the actions of
15 the County resulted in *de facto* amendments of the County's Critical Area development
16 regulations.
17

18 Whether or not implementation of the Interim Screening Process resulted in *de facto*
19 amendments of the County's CAO is a preliminary, jurisdictional question. Did the
20 implementation of that process have the effect of amending the County's development
21 regulations? In order to address that question, it is necessary to compare the development
22 regulations included in the County's CAO with the process imposed through application of
23 the ISP.
24

25 Initially, the County's rationale for implementing the ISP requires clarification. IR 60
26 clearly sets forth the County's reasoning which is related to reducing or eliminating liability
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30 ²⁹ 135 Wn. App. 541, 144 P.3d 1219 (2006).

31 ³⁰ *Alexanderson, et al. v. City of La Center*, GMHB Case No. 12-2-0004, Order on Dispositive Motion (May 4,
32 2012), at 11; see also GMHB Case No. 11-3-0012, *Your Snoqualmie Valley v. City of Snoqualmie*, Order on
Motions (March 8, 2012), at 12-13 (Pre-annexation Agreement in direct conflict with City CP policies was a *de*
facto plan amendment).

1 exposure for allowing “take”³¹ of a listed species while a County-wide Habitat Conservation
2 Plan (HCP) was being crafted:

3 The Mazama pocket gopher was listed as threatened under the federal
4 Endangered Species Act in April 2014. The listing went into effect in May 2014.
5 From that point forward, the County has been potentially liable for impacts it
6 allows to gophers through the land use review process, or through the County's
7 own activities in occupied areas. The County chose to work with U.S. Fish and
8 Wildlife Service to limit this liability and to ensure that land-use permitting could
9 continue. Involving the technical expertise of USFWS in performing site reviews
10 also allowed the County to meet the project review requirements of its own
11 Critical Areas Ordinance.³²

12 The County is working on a long-term strategy, known as a Habitat Conservation
13 Plan, which will give landowners the opportunity to proceed with planned
14 activities that could possibly result in inadvertent harm to the species. In the
15 meantime, County staff is using an interim permitting strategy that allows limited
16 development to continue while the long-term HCP is developed.³³

17 The Board cannot fault the County's desire to reduce potential liability while continuing to
18 protect MPG. However, the question before the Board is whether or not the method the
19 County employed resulted in amending its CAO.

20 Since the *Alexanderson* decision, the Board has acknowledged its jurisdiction to
21 review *de facto* amendments where a city or county action has the effect of superseding
22 comprehensive plan or development regulation provisions:

23 Thus, the Court of Appeals *Alexanderson* ruling requires the Board to take an
24 additional step in determining its jurisdiction where the challenged action is
25 alleged to override provisions of a comprehensive plan and constitute a *de facto*
26 amendment.³⁴

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28
29 ³¹ “Take” is defined as follows: “To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to
30 attempt to engage in any such conduct.” IR 12, p. 19718; IR 116, p. 1.

31 ³² IR 60, p. 2. See also IR 125, p. 2.

32 ³³ IR 133, p. 7. (unnumbered).

33 ³⁴ *Alexanderson, et al. v. City of La Center*, GMHB Case No. 12-2-0004, Order on Dispositive Motions (May 4,
34 2012), at 11; see also GMHB Case No. 11-3-0012, *Your Snoqualmie Valley v. City of Snoqualmie*, Order on
35 Motions (March 8, 2012), at 12-13 (Pre-annexation Agreement in direct conflict with City CP policies was a *de*
36 *facto* plan amendment).

1 Similarly, it is incumbent upon the Board to determine whether or not the application of the
2 ISP overrode provisions of Thurston County's CAO. In *BD Lawson Partners*³⁵, the Board's
3 Central Region set out some specific principles to consider when making that decision:

4 Summarizing from *Your Snoqualmie Valley* and *Lake Stevens*, the Board
5 identifies the following principles as critical to the *Alexanderson* analysis:

- 6
- 7 • The explicit language of the City's action is not dispositive.³⁶
 - 8 • Whether or not an action is a *de facto* amendment depends on the actual,
9 legal effect of the action.³⁷
 - 10 • Although a unilateral action may constitute an amendment, the actual legal
11 effect must require a particular legislative result.³⁸

12 In this matter, the County repeatedly stressed in its brief and at oral argument that
13 the ISP was merely an enhanced screening tool to determine the presence of threatened
14 MPGs. It observed that prior to the federal listing, it had used WDFW's Priority Habitat and
15 Species Management Recommendations to screen development proposals for MPG.
16 WDFW's role was then supplanted by USFWS' recommendations.³⁹ Its position is that
17 application of the ISP (or the prior WDFW process) did not amend its development
18 regulations designed to protect the gopher but rather it has been and is used to only,
19 initially, determine their presence. Protective development regulations, the County argues,
20 were unchanged. It likens application of the ISP to a preliminary decision regarding the
21 presence of wetlands, another type of Critical Area.⁴⁰

22 The Board considered and reviewed what Petitioners describe as a Table of
23 Inconsistencies, a table setting forth Petitioners' description of the CAO's requirements and
24 comparing them with the 2015 ISP.⁴¹ Set out below is IR 121, a County document
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26
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28 ³⁵ *BD Lawson Partners LP, et al v City of Black Diamond*, Order of Dismissal, at 5, 6.

29 ³⁶ *Your Snoqualmie Valley*, Order on Motions, GMHB Case No 11-3-0012 (March 8, 2012), at 9.

30 ³⁷ *Id.*, at 12, citing *Alexanderson*, 135 Wn. App. 541, 548-50.

31 ³⁸ *Alexanderson*, 135 Wn. App. 541, 548-9; *Lake Stevens v. Snohomish*, Order on Motions, GMHB Case No.
32 09-3-0008 (July 6, 2009) at 4; *Your Snoqualmie Valley*, Order on Motions, GMHB Case No 11-3-0012 (March
8, 2012) at 12, citing *Alexanderson* at 548-50.

³⁹ Respondent's Pre-Hearing Brief, p. 2.

⁴⁰ Chapter TCC 24.30 Wetlands.

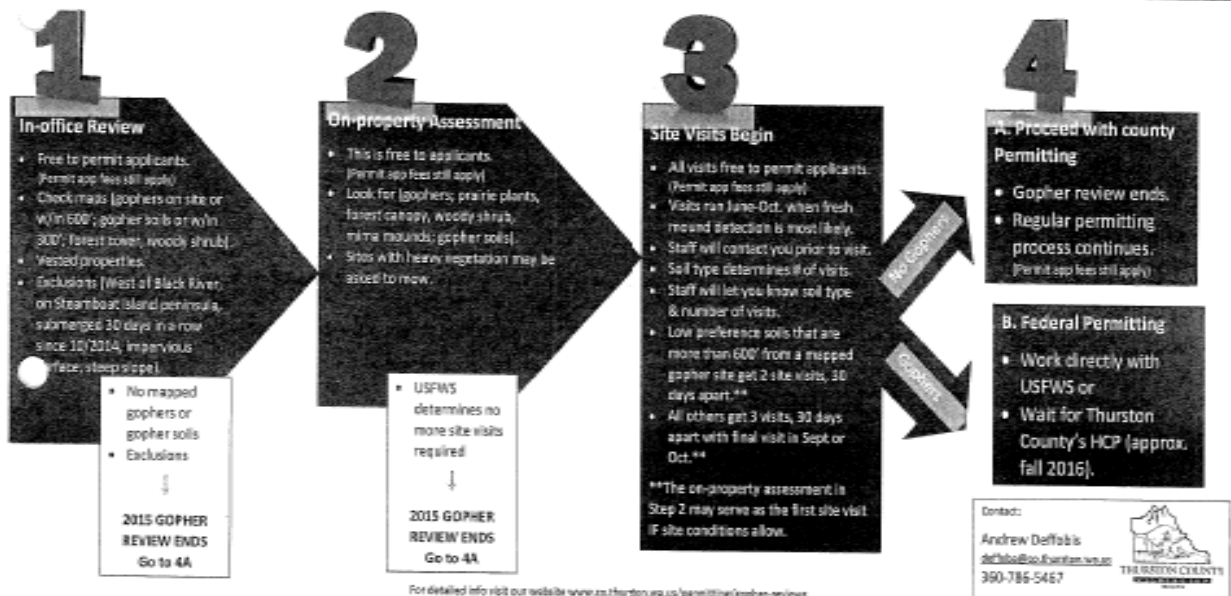
⁴¹ Petitioners' Pre-Hearing Brief, pp. 8, 9.

schematically describing the 2015 ISP permit process. IR 121 is then followed by the Petitioners' Table of Inconsistencies.

2015 Gopher Review Process for Permits

This is the process we follow after you apply for a building permit.

Three species of Matamoras pocket gopher were listed in May 2014 as "Threatened" under the federal Endangered Species Act. Because they require protection under federal law, the U.S. Fish & Wildlife Service (USFWS) developed this process with Thurston County to review land use permits. This process is part of Thurston County's Critical Areas Ordinance review. Please note that Matamoras pocket gophers may be present on a site even if you can't see them. If gophers are found at any point, the process moves to step 4B.



For detailed info visit our website www.co.thurston.wa.us/permitting/gopher-reviews

Table of Inconsistencies: 2012 Thurston County CAO v. 2015 Interim Process

Adopted CAO	2015 Interim Process
1. All applications for any County-issued permit that contain a proposal within a critical area or its buffer are classified as Type I through IV applications, with <u>specified timelines</u> associated with those processes. TCC 24.05.010; see <i>also</i> Table 24.05-1.	Permit applications are placed on <u>holds of unspecified duration</u> if site visits were not completed by October 31, 2015. Index Nos. 115 and 126-128.
2. Following receipt of an application for a project on a critical area, <u>the director visits the site once</u> . TCC 24.05.027(A); 24.03.010; 24.25.075(A) (applications on sites containing a habitat or species shall include a critical area report) (citing 24.05.027); 24.35.250 (same, identifying special reports).	County and non-County staff <u>visit the site between two and five times</u> . Index Nos. 121 and 125.
3. Applicants <u>may be required to hire a professional to perform a survey</u> if the director is unable to determine whether a critical area exists on the site. TCC 24.05.027(B).	<u>Applicants have no ability to move the critical area identification process forward by hiring a qualified professional</u> ; applicants must wait for agency staff to conduct site visits, and applicants do not receive the data forms generated during those site visits. Index No. 125.
4. If the professional's survey is inconclusive, the director <u>may require the applicant to submit a Critical Area Report that outlines impacts and their mitigation</u> . TCC 24.05.027(C); 24.35.290 (requirements for reports).	<u>Applicants cannot identify impacts and propose mitigation</u> ; they must prove compliance with the options of a "take" letter by relocating the project, waiting for the County HCP, or preparing an individual HCP. Index Nos. 121, 125 and 130.

<p>1 5. If a species or habitat is present, then</p> <p>2 <u>“[t]he approval authority shall establish</u></p> <p>3 <u>buffers for the habitat or species on a</u></p> <p>4 <u>case-by-case basis</u>, in consultation with</p> <p>5 the [Washington Department of Fish and</p> <p>6 Wildlife (“WDFW”)] or others with</p> <p>7 expertise, based on the critical area</p> <p>8 report and the WDFW management</p> <p>9 recommendations for Washington’s</p> <p>10 priority habitats and species.” TCC</p> <p>11 24.25.075(B). The WDFW has</p> <p>12 published management</p> <p>13 recommendations for the Mazama</p> <p>14 pocket gopher. See Index No. 32</p> <p>15 (Priority Habitats and Species</p> <p>16 Management Recommendations:</p> <p>17 Mazama Pocket Gopher).</p>	<p>If a species or habitat is present, then</p> <p>the permit application is frozen until the</p> <p>County HCP is issued or the applicant</p> <p>receives an individualized HCP. Index</p> <p>Nos. 121, 125 and 130.</p>
<p>14 The CAO includes <u>multiple exceptions</u>.</p> <p>15</p> <p>16 “Clearing and grading in conjunction</p> <p>17 with an approved development project”,</p> <p>18 “on-site sewage”, and “single-family</p> <p>19 residential, new” are all approvable uses</p> <p>20 in “important species habitats” including</p> <p>21 Mazama pocket gopher habitat. Table</p> <p>22 24.25-3.</p> <p>23</p> <p>24 No critical area report is required for</p> <p>25 developed parcels less than one acre in</p> <p>26 size, which are surrounded by</p> <p>27 development, as well as new</p> <p>28 development on vacant parcels less</p> <p>29 than ½ acre in size. TCC</p> <p>30 24.35.260(C)(3), (4).</p> <p>31</p> <p>32 The CAO does not apply to sheds,</p> <p>agriculture buildings, or buildings less</p> <p>than 200 square feet. <i>Id.</i></p>	<p>The 2015 Interim Process recognizes <u>no</u></p> <p><u>exceptions</u>. See Index Nos. 14, 15, and</p> <p>60 (containing no exceptions).</p>

<p>6. The duration of the critical area permit approval is either <u>the length of the building permit or three years</u>. TCC 24.40.080.</p>	<p>A “good to go” letter <u>expires by October 31, 2016</u>. Index No. 124.</p>
<p>7. <u>Third party review is limited</u> to when the application has factual errors, there are inconsistencies with accepted scientific criteria, there are substantive differences interpreting data, or specialized expertise is required. TCC 24.05.022(C). The County is required to issue the final permit decision, not an outside agency such as WDFW or USFWS. TCC 24.05.025(B); 24.40.040.</p>	<p><u>Outside agency review is included in every application</u>. See Index Nos. 121 and 124.</p>
<p>8. <u>Any aggrieved person may appeal an administrative decision</u> regarding critical area determinations, or denial or approval with conditions of a critical area review permit to the hearing examiner. TCC 24.05.050(A).</p> <p><u>Any aggrieved party may appeal a hearing examiner decision</u> on administrative appeals to the board of county commissioners. <i>Id.</i> at (B).</p>	<p>The 2015 Interim Process does not result in issuance of a critical area review permit, and provides <u>no means for an aggrieved property owner to appeal the USFWS determination of “take” letter</u>. See Index No. 15 (no appeal process available).</p>

The IR 121 ISP process leads to either Step 4A or Step 4B (see page 10 above). If at Step 4A, there has been a determination that the proposed development activity is unlikely to result in take of the listed gopher. At that point, the USFWS issues what the parties have referred to as “good-to-go” or “clearance” letters.⁴² Issuance of a “good-to-go” letter is a necessary prerequisite to the County’s issuance of a land use permit.

⁴² Petitioners’ Pre-Hearing Brief, p. 5; Respondent’s Pre-Hearing Brief, p. 4. IR 61: “If visits result in determination of no gophers or low probability, USFWS will send clearance letter to TC [Thurston County]. . .”. IR 23 is an example of such a letter.

- 1 • Steps 1 to 4a are the County's Screening Process

2 The Board agrees with the County's position that IR 121's Steps 1, 2, and 3 serve
3 merely to screen development applications for the presence of MPG. While the process
4 may delay ultimate consideration of a development application, no aspect of the County's
5 screening for MPG presence conflicts with the CAO regulations cited by Petitioners. For
6 example, with alleged Inconsistency 2, the argument is that the number of site visits
7 provided for by TCC 24.05.027(A)⁴³ has increased from one to as many as five. The
8 County observes that TCC 24.05.027(A) is preceded by the statement that critical area
9 reviews "generally" follow the sequence referenced. Furthermore, the Board observes that
10 a regulation which states that "the director shall visit the site" does not limit the number of
11 site visits. Increasing the number of site visits does not result in an amendment of the CAO.

12 Petitioners' Inconsistencies 2, 3, 4, 5, and 7 all include references to specific items
13 that may be required to be submitted with a development application or which the County
14 may subsequently request or impose. Examples include: Inconsistency 2-inclusion of a
15 critical area or special report; Inconsistency 3-performance of a survey; Inconsistency 4-
16 submission of a critical area report outlining impacts and mitigation; Inconsistency 5-
17 establishment of buffers; and Inconsistency 7-third party review. It is unclear from the
18 record or argument what if anything is required to be submitted at Step 1 of the ISP. For
19 purposes of this decision, however, the Board assumes the "regular permitting" process is
20 deferred until Step 4A. Even if some or all of the regulatory development application
21 inclusion requirements referenced by the Petitioners apply from the beginning (Step 1), it is
22 not determinative to this decision because the Board has concluded that ISP Steps 1, 2,
23 and 3 constitute a process to ascertain the possible presence of MPGs (the County's
24 "screening tool"). The actual processing of a development permit application is deferred

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29 ⁴³County Site Visit. When a critical area screening tool or other source of information indicate the possible
30 presence of a critical area or associated buffer on a subject property, the director shall visit the site to verify
31 what critical areas or associated buffers may exist on site. Depending on the type of critical area being
32 evaluated, the size of the parcel, the nature of surrounding development, and the level of degradation or
development already existing on site, the director may be able to determine that no jurisdictional critical
area exists on the subject property, or that the proposed activity will not impact the functions of any critical
areas or associated buffers on site.

1 until at least Step 4A of IR 121.⁴⁴ Assuming an applicant has made it to Step 4A, the
2 various CAO permit application requirements referenced by Petitioners in the
3 aforementioned Inconsistencies may be imposed. Processing of an application would
4 proceed as set out in the CAO. No CAO amendment(s) result.

5 In alleged Inconsistency 6, the Petitioners state TCC 24.40.080⁴⁵ provides that a
6 Critical Area Review Permit granted by the County's has a three-year expiration date which
7 now has been changed through application of the ISP to expire in one year. That assertion
8 is based on the fact that "good to go" letters issued by the USFWS during the 2015
9 screening season were valid through October 31, 2016.⁴⁶ (Similarly, these USFWS letters
10 issued during 2016 are proposed to be valid through October 31, 2017.)⁴⁷ However, the
11 County asserts that it has made no change whatsoever in regards to the three-year permit
12 validity. Rather, once it issues a permit, "... the County's responsibilities related to the
13 gopher are done. Once you have your permit and the permit has been issued, those
14 responsibilities are over."⁴⁸ The County does not change the applicant's permit timeline.
15 Thus, the County's CAO was not amended. The Board concludes that the Petitioners have
16 failed to establish that these differences constitute an amendment of the CAO.
17

18 With Inconsistency 5, Petitioners allege, in part, that the CAO included three specific
19 exceptions from critical area regulation compliance while the ISP "recognizes no
20 exceptions".⁴⁹ Two of the supposed inconsistencies (waiver of critical area report and
21 exemption for certain buildings) are referenced in TCC 24.35.260(C). As the County points
22
23
24

25 ⁴⁴ Step 4A: Proceed with county Permitting

- 26 • Gopher review ends.
27 • Regular permitting process continues.

28 ⁴⁵ TCC 24.40.080(C): The critical area review permit shall also expire when the use or activity specifically
29 allowed through a critical area review permit is vacated for a period of three years.

30 ⁴⁶ IR 15, p. 2. See also HOM Transcript, p. 66: PRESIDING BOARD MEMBER ROEHL: Say that the U.S. Fish
31 & Wildlife Service has issued a good-to-go letter, it expires in one year, roughly a year.

32 MR. PETERS: Correct.

⁴⁷ IR 199, p. 2.

⁴⁸ HOM Transcript, p. 67; See also HOM Transcript, p. 68: MR. PETERS: [If you have a building permit] Then
Thurston County is no longer involved in the process, assuming that you would have the building permit,
because the issue of gophers had been resolved to the county's satisfaction and the permit was issued.

⁴⁹ Petitioners' Pre-Hearing Brief, p. 9.

1 out that code subsection applies only to land development activities on "prairie soil type(s)",
2 a separate Critical Area, not to MPGs.⁵⁰ The other "exceptions" involve "clearing and
3 grading in conjunction with an approved development project", "on-site sewage", and
4 "single-family residential, new". The Petitioners stated these are all approvable uses within
5 MPG habitat.⁵¹ However, the County is correct in stating these activities are not exceptions.
6 Rather, the Code states they are "Permitted, subject to Critical Area Review Permit and
7 requirements of this Title".⁵² They are "approvable" but still require compliance with the
8 CAO. The Board concludes that the Petitioners have failed to establish that these alleged
9 "differences" constitute an amendment of the CAO.
10

- 11
- 12 • Step 4b amends the CAO in several ways

13 However, when application of the screening tool moves a development applicant to
14 Step 4B, the ramifications are demonstrably different from the established CAO
15 application/review process. As Step 4B provides, the application process is placed on hold:
16 "Federal Permitting" then applies and the applicant has two alternatives: "Work directly with
17 USFWS or Wait for Thurston County's HCP (approx. fall 2016)."⁵³
18

- 19
- 20 • Timelines have been amended

21 The Petitioners point out that the CAO includes specific timelines for issuance of
22 decisions. TCC 24.05.010 and TCC 24.05.020 list four separate processes for reviewing
23 critical area permit applications, depending on complexity and the amount of discretion
24 involved, and the procedures applicable to each. Those sections in turn refer to and provide
25 for processing of the four types of applications, which are addressed in TCC 20.60.020(1)-
26 (4). For example, TCC 20.60.020(1)(c) (set out below) provides that a Type I application
27 (ministerial) is to be approved, approved with conditions or denied within 58 days of a
28 complete application. Type II applications are administrative decisions and are to be
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31 ⁵⁰ HOM Transcript, pp. 96, 97.

32 ⁵¹ Petitioners' Pre-Hearing Brief, p. 9.

⁵² IR 3, p. 122.

⁵³ IR 121.

1 approved, approved with conditions or denied within 100 calendar days of the date of the
2 letter of complete application, although there are some exceptions.⁵⁴ Type III applications
3 are quasi-judicial in nature, involve the hearing examiner, and have a longer deadline.⁵⁵

4 The County also has a Type IV application which are legislative decisions.

5 TCC 20.60.020 - Application review procedures. (in relevant part, emphasis added)

6
7 1. Type I Procedure—Ministerial Decision (see Appendix Figure 15).

8 c. Within fifty-eight calendar days of the date that the Type I application is
9 submitted, the approval authority, as provided in Table 2, shall approve,
10 approve with conditions, or deny the application, and shall mail the decision to
11 the applicant. In determining the number of days that have elapsed after the
12 application submittal date, the following periods shall be excluded:

- 13 i. Any period during which the applicant has been requested by the
14 department to correct plans, perform required studies, or provide
15 additional required information;
16 ii. Any period of time during which an administrative appeal is being
17 processed;
18 iii. Any extension of time mutually agreed upon in writing by the applicant and
19 the department.

20 d. At any time after the application is submitted, the department may request
21 additional information or studies that are needed to complete the review due to
22 the particular aspects of the project or site or if substantial changes are made to
23 the proposed project. If this occurs, the applicant will be notified in writing as to
24 what additional information is needed and the review clock will stop during the
25 time that the applicant is assembling this information. The review clock will
26 begin again once this additional information is submitted and deemed complete.
27 The department shall make a determination of completeness within fourteen
28 calendar days of submittal of any additional information.

29 The Petitioners observe that under the ISP, complete Type 1 permit applications, for
30 example, are placed on hold for extended, unknown periods of time rather than being
31 subject to the 58 day timeline. The County responds by citing TCC 20.60.020(1)(c)(i) which

32 ⁵⁴ TCC 20.60.020 (2) (j) and (k). Additionally, the Board notes TCC 20.60.020(m) which states that if the
County is unable to issue its decision within the timelines provided, it is required to provide written notice of
that fact and an estimate of when the decision might be made.

⁵⁵ TCC 20.60.020(3).

1 provides that the time line for issuing a decision can be extended when the department has
2 requested the applicant to "correct plans, perform required studies, or provide additional
3 required information"⁵⁶ Similar exceptions apply to the other categories of applications.
4 However, in this instance, the Board assumes the permit application is complete. Beyond
5 that, there do not appear to be any provisions in the ISP where an applicant is requested to
6 "perform [any] required studies". Nor does the Record make reference to any situation
7 where an applicant would be requested to submit additional studies. Rather, IR 121 and
8 128 clearly indicate that if MPGs are present on the property, the applicant has to work
9 directly with USFWS to develop an HCP⁵⁷ (estimated at 18-24 months) or await a County-
10 wide HCP. A County-wide HCP is estimated to be completed in the fall of 2016⁵⁸ or 2017.⁵⁹
11 Processing of the application is simply halted awaiting development of an HCP.
12

- 13
- 14 • Applicant proposed mitigation no longer allowed

15 The above analysis regarding amended timelines also implicates portions of
16 Petitioners' Inconsistencies 4 and 5. With these, Petitioners argue they no longer have the
17 ability to identify impacts that would result from their development activity and propose
18 mitigation. The County cites TCC 24.05.027(C) which provides that the County "may"
19 require a critical area report including impacts and mitigation. However, Chapter 24.05
20 includes Administrative Procedures applicable to any critical area. Chapter 24.25 is the
21 section specifically applicable to FWHCAs. TCC 24.25.075 applies to a distinct type of
22 critical area: "Important habitats and species". Important habitats and species include both
23 Federal and State of Washington listed species and their associated habitats, thus including
24 the MPG and its habitat as a FWHCA.⁶⁰ That fact triggers TCC 24.25.075(A), a separate
25 section referenced by the Petitioners:
26

27
28 TCC 24.25.075(A)
29

30 ⁵⁶ Respondent's Pre-Hearing Brief, p. 6.

31 ⁵⁷ IR 67, pp. 3-4. "The above process will take approximately 18 months to two years depending on when an
applicant begins the application process . . .".

32 ⁵⁸ IR 61 and IR 121.

⁵⁹ IR 67, p. 5; IR 116, p. 2; IR 128.

⁶⁰ TCC 24.25.065.

1 Applications for uses and activities on sites containing a habitat or species
2 subject to this section shall include a critical area report (see Chapter 24.35 TCC)
3 prepared by a qualified professional that evaluates the potential impacts of the
4 proposed use or activity on the habitat and/or species, as applicable. The
5 process for determining whether critical area reports are required, and the extent
6 of information required is outlined in Chapter 24.05.027 TCC. Critical area
7 reports that pertain to important habitats and species may also be referred to as
8 habitat management plans. (Emphasis added)

- Critical Area Reports no longer required

9 Critical Area Reports are no longer required if one arrives at Step 4B of the ISP. See
10 IR 121. Furthermore, since such reports are not required, the use of qualified
11 professionals⁶¹ in preparing them has been rendered moot. Beyond that, the USFWS
12 stated: "Landowners should be aware that engaging third party surveyors (consultants,
13 biologists, etc.) to assess Mazama pocket gopher presence may not meet USFWS needs;
14 consequently, such assessments will not substitute for the 2015 screening approach
15 described here."⁶² The unwillingness of the USFWS to accept these assessments was
16 incorporated into the ISP by the County. It is as if TCC 24.05.027(A) was rescinded in
17 regards to MPGs, if one is at Step 4B. Similarly, some requirements of TCC 24.35.250
18 have also been superseded; in effect, rescinded, as those portions apply to MPGs and their
19 habitat.⁶³

- Use of professionals no longer allowed

22 The County also suggests the reference to "qualified professionals" is misleading as
23 WDFW, which had "maintained a list of consultants who had received training on gopher
24
25
26

27 ⁶¹ TCC 24.35.260(A): Critical area reports shall be prepared by a qualified professional biologist with
28 experience preparing reports for the relevant species or type of habitat. The report shall be prepared in
29 consultation with staff from the appropriate state agency, such as WDFW or DNR.

30 ⁶² IR 14, p. 2.

31 ⁶³ TCC 24.35.250, in part: Applications for development proposals on property containing an important species
32 or habitat shall provide: a critical area report; a drainage and erosion control plan; and a grading plan as
indicated in this chapter. Applications for development proposals that are within six hundred feet of a point
location of an important species may be required to submit special reports described in this chapter if the
approval authority determines that the project location and nature may have an impact on an important
species. (Emphasis added)

1 survey methodology” suspended its involvement following the Federal MPG ESA listing.⁶⁴
2 But that observation does not address the fact that the code section required “critical area
3 reports” prepared by a “qualified professional” and that such reports are no longer part of
4 the Step 4B development application process.

5 The County further contends that Petitioners’ argument “that applicants must prove
6 compliance with the options of a ‘take’ letter written by USFW” “disregards the option of any
7 County applicant to pursue a Reasonable Use Exception or appeal a County land use
8 decision”.⁶⁵ Similarly, that contention does not directly address the fact that an applicant, in
9 Step 4B, does not receive a permit if it is determined that MPGs are present on the
10 applicant’s property. That applicant’s only options are to “work directly with USFWS or wait
11 for Thurston County’s HCP”.⁶⁶

12 Finally, as referenced above, the Petitioners also contend that under the CAO,
13 applications containing a protected habitat or species were required to submit a critical area
14 report, citing TCC 24.25.075A.⁶⁷ The first sentence of that code section refers to chapter
15 24.35 TCC which includes requirements for “submittal requirements of special reports
16 associated with development that impacts critical areas and/or their associated buffers”.⁶⁸
17 TCC 24.35.260 is a section of that chapter which provides:

18 All applications for projects requiring a critical area review permit (see Chapter
19 24.40 TCC) on sites containing important habitats and species areas or
20 associated buffers shall include a critical area report as specified in this section.
21 The critical area report for important habitats and species may also be referred to
22 as a habitat management plan. If the use or activity is proposed to be located
23 within an important habitat area or an associated buffer, a mitigation plan shall
24 also be submitted.⁶⁹ (Emphasis added)

25
26 ⁶⁴ Respondent’s Pre-Hearing Brief, p. 7.

27 ⁶⁵ *Id.*

28 ⁶⁶ IR 121.

29 ⁶⁷ Applications for uses and activities on sites containing a habitat or species subject to this section shall
30 include a critical area report (see Chapter 24.35 TCC) prepared by a qualified professional that evaluates the
31 potential impacts of the proposed use or activity on the habitat and/or species, as applicable. The process for
32 determining whether critical area reports are required, and the extent of information required is outlined in
Chapter 24.05.027 TCC. Critical area reports that pertain to important habitats and species may also be
referred to as habitat management plans. (Emphasis added)

⁶⁸ TCC 24.35.010.

⁶⁹ As seen, TCC 24.35.260 in turn refers to chapter 24.40 TCC which includes TCC 24.40.010:

1 With the County's application of the ISP at Step 4B, no critical area report is required nor is
2 a critical area review permit generated contrary to the referenced sections of the Code. The
3 applicant is not required to submit a mitigation plan as provided by TCC 24.35.260. The
4 report and permit process remains unchanged only for those applicants at Step 4A of IR
5 121-a determination that MPGs are not likely to be impacted by the proposed project. For
6 those at Step 4B, their applications are placed on an indefinite hold pending the
7 development of a county-wide or individual HCP under Step 4B of IR 121.
8

- 9 • Mitigation sequencing no longer allowed

10 It is significant that mitigation or mitigation sequencing is no longer applicable to
11 those at Step 4B. "Mitigation" and "mitigation sequencing" include as the first option,
12 avoidance of any impact. If avoidance is not possible, the following steps in mitigation
13 sequencing are minimizing, rectifying, reducing, and compensating. See the Department of
14 Ecology's WAC 197-11-768. Thurston County's TCC 24.01.037⁷⁰ and TCC 24.35.015⁷¹
15
16

17 Unless otherwise provided in this title, a critical area review permit is required for all development
18 permits for properties that may be impacting critical areas and associated buffers or critical area
19 evaluation areas on their property. A critical area review permit may be combined with other
20 permits; see TCC Section 24.05.03. A critical area review permit will not be required for
21 reasonable use exceptions in Chapter 24.45 TCC, initial emergency authorizations in Chapter
22 24.90 TCC, critical area determinations in TCC Section 24.05.070, and county initiated
23 amendments to this title or the Thurston County Comprehensive Plan (Type IV permits). The
24 critical area review permit shall comply with all provisions of this title. (Emphasis added)

25 ⁷⁰ Mitigation actions associated with development proposals impacting critical areas shall adhere to the
26 following mitigation sequence:

- 27 A. Avoiding the impact altogether by not taking a certain action or parts of an action;
- 28 B. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by
29 using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;
- 30 C. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- 31 D. Reducing or eliminating the impact over time by preservation and maintenance operations
32 during the life of the action;
- 33 E. Compensating for the impact by replacing, enhancing, or providing substitute resources or
environments; and/or
- 34 F. Monitoring the impact and taking appropriate corrective measures.

⁷¹ All proposals that require submittal of a mitigation plan due to impacts to a critical area or buffer shall
employ the following sequence in order to reduce those impacts. Redesign, reconfiguration or relocation of a
proposal to avoid impacts shall be preferable to submittal of a mitigation proposal. Mitigation actions
associated with development proposals impacting critical areas shall adhere to the following mitigation
sequence:

- A. Avoiding the impact altogether by not taking a certain action or parts of an action;

1 include that exact sequence. Specifically in regards to MPG, the County's CAO regulations
2 (TCC 24.25.075B) refer to the WDFW's management recommendations and the
3 establishment of "buffers for the habitat or species on a case-by-case basis". WDFW's
4 MPG recommendations similarly include mitigation sequencing.⁷² While those steps may
5 be delayed until IR 121's Step 4A, they are at best indefinitely deferred, or significantly
6 amended, if the presence of MPGs is determined. Step 4B of IR 121. While the County
7 denied "mitigation sequencing" was no longer applicable, the following discussion at the
8 HOM illustrates the fact that, at best, it was to be handled quite differently than under the
9 CAO:
10

11 PRESIDING BOARD MEMBER ROEHL: . . . In the past, under the existing
12 critical areas ordinance, it was pretty clear, in my reading of it, that mitigation
13 sequencing was allowed.

14 MR. PETERS: Correct.

15
16 BOARD MEMBER MOSHER: Now the options are if I have gophers on my
17 property, I either wait for the county-wide HCP or I work with U.S. Fish & Wildlife
18 Service on an individual HCP.

19 MR. PETERS: Which essentially is a mitigation based upon negotiation with Fish
20 & Wildlife, so it's a different type of mitigation, but it's still mitigation. And that's,
21 again, based upon the heightened level of protection for the gopher. It's now a
22 threatened species versus an important species through the state of Washington.

23 PRESIDING BOARD MEMBER ROEHL: And that begs a question. If it's a
24 heightened level of regulation or heightened level of protection, aren't you in
25 effect saying that the regulations have been amended?
26
27

-
- 28 B. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by
29 using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;
30 C. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
31 D. Reducing or eliminating the impact over time by preservation and maintenance operations
32 during the life of the action;
E. Compensating for the impact by replacing, enhancing, or providing substitute resources or
environments; and/or
F. Monitoring the impact and taking appropriate corrective measures.

⁷² IR 32, p. 1-5.

1 MR. PETERS: I don't think so, because I don't think that the actions of the interim
2 screening process are at all inconsistent with state and local or federal law, and
3 we had protections in place for the gopher prior to the designation of threatened
4 species.⁷³

5 Mitigation sequencing as contemplated by the CAO (where it is proposed by the applicant
6 and addressed on a case-by-case basis) is either no longer applicable or has been
7 amended by application of the ISP.⁷⁴

8 The following statements included in the Record are also relevant to the Board's
9 ultimate decision as to whether or not certain elements of the ISP effectuated amendments
10 of the County's CAO (Emphasis added):

- 11 1. We disagree [that the GMA provides enough regulatory certainty to protect
12 MPG]. [The GMA] does not mandate the establishment of performance
13 measures for the requirement of monitoring... Further, current implementation
14 of the GMA fails to sufficiently curb the continued fragmentation and loss of
15 Mazama pocket gopher populations and habitat. (USFWS Fed. Reg. listing of
16 MPG) IR 11, page 19768.
- 17 2. Although the GMA and associated critical areas protections have certainly
18 provided greater protection to priority habitats and species than existed prior
19 to their passage, it does not necessarily follow that they are sufficient to
20 conserve the four Thurston/Pierce subspecies of the Mazama pocket gopher .
21 . . (USFWS Fed. Reg. listing of MPG) IR 11, page 19768.
- 22 3. The Service [USFWS] does not agree that these recommendations (WDFW's
23 Priority Habitat and Species) provide enough regulatory certainty to
24 ameliorate threats to the Mazama pocket gopher to the extent that listing
25 would not be warranted. (USFWS Fed. Reg. listing of MPG) IR 11, Page
26 19769.
- 27 4. The Service actually concluded that although the existing State and local
28 regulatory schemes provided some conservation measures, they are

29 ⁷³ HOM Transcript, p. 91, 92.

30 ⁷⁴ See also IR 133, unnumbered p. 7: "How is the interim permitting strategy be (sic) different than current land
31 use regulations? . . . Until now, landowners who apply for a permit and have prairie species on their property
32 typically would address their impacts through setting aside habitat areas on-site. With the HCP, the goal will be
to protect and enhance large, intact areas of prairie habitat. Small set asides on individual parcels may not
accomplish this goal."

1 inadequate to reduce the threats within both Thurston and Pierce Counties.
2 (USFWS Fed. Reg. listing of MPG) IR 11, Page 19769.

- 3 5. Until then [issuance of a special "take" permit from the federal government]
4 we follow USFWS guidance as part of our existing Critical Areas Ordinance
5 review in order to limit our liability and yours under federal law. (County
6 handout dated 7/10/15) IR 130.

7 **6. How is the interim permitting strategy be (sic) different than current**
8 **land-use regulations?**

9 Until now, landowners who apply for a permit and have prairie species on
10 their property typically would address their impacts through setting aside
11 habitat areas on-site. With the HCP, the goal will be to protect and enhance
12 large, intact areas of prairie habitat. Small set-asides on individual parcels
13 may not accomplish this goal. (USFWS handout dated April, 2014) IR 133, p.
14 7 (unnumbered).

- 15 7. Three species of Mazama pocket gopher were listed in May 2014 as
16 "Threatened" under the federal Endangered Species Act. Because they
17 require protection under federal law, the U.S. Fish and Wildlife Service
18 (USFWS) developed this process with Thurston County to review land-use
19 permits. This process is part of Thurston County's Critical Areas Ordinance
20 review. (Emphasis added) IR 121.

- 21 8. The 2015 ISP reflects the mandate to protect species, and in fact furthers and
22 strengthens the goals of the GMA and Thurston County's CAO by creating a
23 tool to ensure that threatened species are protected in the interim while
24 continuing to allow development by landowners. Respondent's Pre-Hearing
25 Brief, p. 15.

26 **Summary of Conclusions**

27 The Board finds that implementation of the Interim Screening Process did result in *de*
28 *facto* amendments of the County's Critical Areas Ordinance. RCW 36.70A.030(7) defines
29 "development regulations" as "controls placed on development or land use activities". By
30 directing County staff to implement the ISP, the County placed controls on land use
31 activities which differ from the Critical Areas Ordinance when the ISP indicates the likely
32 presence of MPGs (Step 4B):

- 1 1. The County's specific timelines for issuance of permit decisions have been
2 amended. Applications are now placed on hold for extended periods of time
3 rather than being subject to the applicable Thurston County Code timelines.
- 4 2. Applicants no longer have the ability to identify impacts that would result from
5 their development activity and propose mitigation.
- 6 3. The use of qualified professionals in preparing Critical Area Reports is no
7 longer allowed.
- 8 4. Mitigation sequencing as contemplated by the CAO (proposed by the
9 applicant) is no longer applicable.
- 10 5. Critical Area Reports are no longer required.

11
12 The *Alexanderson* decision addressed *de facto* amendments of a jurisdiction's
13 comprehensive plan. "A comprehensive land use plan is 'a generalized coordinated land
14 use policy statement of the governing body of a county or city' RCW 36.70A.030(4)."⁷⁵
15 In this matter, the allegations involve development regulations which are specific land use
16 activity controls. Some of those specific controls at issue here which are included in the
17 CAO have either been superseded or amended. While application of the ISP does not
18 explicitly amend the CAO, some portions of it have "the actual effect of doing so".⁷⁶ To
19 paraphrase the *Alexanderson* decision: "Because the [ISP] has the legal effect of amending
20 the [CAO], just as if the words of the [CAO] itself had been changed to mirror the [ISP], the
21 [ISP] was a *de facto* amendment and the Board has jurisdiction."⁷⁷

22
23
24 Consequently, based on the *Alexanderson* decision and the analysis above, the
25 Board finds and concludes it has jurisdiction over the subject matter of the Petition for
26 Review pursuant to RCW 36.70A.280(1)(a). The Petitioners have met their burden of proof
27 in regards to Issue A as set forth in the Prehearing Order of December 18, 2015.⁷⁸
28

29
30 ⁷⁵ *Alexanderson v. Bd. of Comm'rs*, 135 Wn. App. 541, 549 (. 2006).

31 ⁷⁶ *Id.*

32 ⁷⁷ *Id.*, at 550.

⁷⁸ Issue A. Did the County's decision to apply the 2015 Interim Process, which varies significantly from its adopted CAO, to all applications submitted to the County after June 1, 2015, constitute a *de facto* amendment to its CAO in violation of RCW 36.70A.060, 36.70A.130, and 36.70A.390?

1 **Lack of Public Participation**

2 The GMA requires counties to provide for early and continuous public participation
3 before a vote is taken on any change to a development regulation.⁷⁹ "Citizen participation is
4 a core goal of the GMA. RCW 36.70A.020(11)."⁸⁰ See RCW 36.70A.035 and RCW
5 36.70A.140.⁸¹ Thurston County's own public participation measures provide that it "... will
6 use a variety of methods for early and continuous citizen participation in the development
7 and amendment of ...development regulations ...".⁸² Those methods include
8 "Dissemination of Proposals", "Open Discussion of Proposals", "Provision of Information
9 Services", and "Public Hearings".⁸³ In this matter, there was no GMA compliant notice, no
10 public hearing, and no public vote. It appears the BOCC merely directed County staff to
11 implement the ISP. The County has not disputed the Petitioners' allegation that the
12 County's action was taken "... without motion, resolution, or ordinance subject to public
13 hearing or participation...".⁸⁴ With that being the case, the Board finds and concludes that
14 the County's actions, which constituted *de facto* amendments of the CAO, as specifically
15 delineated above, violated RCW 36.70A.035 and RCW 36.70A.140. The Petitioners have
16 met their burden of proof in regards to Issue B as set forth in the Prehearing Order of
17 December 18, 2015.⁸⁵
18
19
20
21

22 ⁷⁹ *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 188 Wn. App. 467, 472 (2015); *Burien v. Growth*
23 *Mgmt. Hearings Bd.*, 113 Wn. App. 375, 386 (2002).

24 ⁸⁰ *Id.*, at 490.

25 ⁸¹ RCW 36.70A.140, in part: Each county and city that is required or chooses to plan under RCW 36.70A.040
26 shall establish and broadly disseminate to the public a public participation program identifying procedures
27 providing for early and continuous public participation in the development and amendment of comprehensive
28 land use plans and development regulations implementing such plans. The procedures shall provide for broad
29 dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective
30 notice, provision for open discussion, communication programs, information services, and consideration of and
31 response to public comments. See also WAC 365-196-600 which restates these requirements.

32 ⁸² IR 6, TCC 2.05.030.

⁸³ *Id.*

⁸⁴ Petition for Review, filed November 24, 2015, p. 1. The County did vigorously argue that there was
extensive publicity prior to and following imposition of the ISP. See Respondent Thurston County's Motion to
Dismiss Petition for Lack of Timeliness, filed January 19, 2016.

⁸⁵ Issue B. Did the County's implementation of the 2015 Interim Process without public notice or participation
violate RCW 36.70A.020(11), 36.70A.035, 36.70A.106(3)(a), 36.70A.130(2), and 36.70A.140?

1 A failure of public participation requires a finding of noncompliance and remand of
2 the matter without addressing the substance of the jurisdiction's actions as challenged by
3 the Petitioners. Since the Board has concluded that portions of the ISP were *de facto*
4 amendments of the CAO, the public participation issue⁸⁶ disposes of the case. Addressing
5 the remaining issues raised by the Petitioners would violate RCW 36.70A.290(1) concerning
6 advisory opinions. *FOSC v. Skagit County*.⁸⁷ See also *Neighborhood Alliance, et al v.*
7 *Spokane County*, No. 13-1-0006c, Order on Dispositive Motion, November 26, 2013, p.
8 15⁸⁸; *Servais v Bellingham*, No. 00-2-0020, Final Decision and Order, October 26, 2000⁸⁹;
9 *Achen v. Clark County*, No. 95-2-0067, Compliance Order, October 1, 1996, p. 16-17⁹⁰. The
10 remaining Issues, Issue C through Issue H, are included in the attached Appendix.
11

12 **Invalidity**

13
14 Petitioners have urged the Board to impose invalidity against the County's application of
15 the ISP.⁹¹ They argue that the Ordinance substantially interferes with GMA Goals set out at
16 RCW 36.70A.030(1) (urban growth), 6 (property rights), 7 (permits), and 11 (citizen
17 participation and coordination).
18

19 The Board may determine that regulations are invalid after a finding of non-compliance,
20 but it may do so only when it finds that "the continued validity of part or parts of the plan or
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22 ⁸⁶ Issue B, Prehearing Order, December 18, 2016: Did the County's implementation of the 2015 Interim
23 Process without public notice or participation violate RCW 36.70A.020(11), 36.70A.035, 36.70A.106(3)(a),
24 36.70A.130(2), and 36.70A.140?

25 ⁸⁷ *FOSC v. Skagit County*, No. 98-2-0007, Finding of Noncompliance and Order of Remand, p. 2, August 13,
26 1998. "If we were to address issues #2 and #3, since the public participation issue disposes of the case, we
27 would violate the provision of RCW 36.70A.290(1) that we not issue 'advisory' opinions."

28 ⁸⁸ "Public participation is a fundamental GMA requirement and a prerequisite to adopting any GMA-related
29 legislation by cities and counties. Given that Resolution No. 13-0689 is totally dependent on and intertwined
30 with GMA's public participation process, Petitioners' substantive issues are not 'ripe' for decision and do not
31 require resolution by the Board at this time. Moreover, the GMA does not allow the Board to issue advisory
32 opinions on issues not requiring resolution."

⁸⁹ "The adoption of an amended development agreement, denominated a memorandum of agreement, that
occurred without any public participation except the noticing of the holding of a work session fails to comply
with the GMA public participation goals and requirements."

⁹⁰ "Whether or not the County has complied with the GMA as to the substantive aspect of the code's adoption
is not decided here because of the flaws in the public participation process. The manner of which Clark County
adopted this code does not comply with the Act."

⁹¹ Petition for Review, p. 14.

1 regulation would substantially interfere with the fulfillment of the goals of this chapter."
2 RCW 36.70A.302(1)(a) and (b). In this instance, the Board has found non-compliance only
3 with regard to RCW 36.70A.035 and RCW 36.70A.140 and has specifically not considered
4 Petitioners' remaining issues (allegations related to the urban growth, property rights or
5 permit Goals) due to the County's public participation failures.

6
7 In the majority of instances, the Board has found invalidity to be appropriate when
8 there is a reasonable risk that the continued validity of non-compliant development
9 regulations would make it difficult for the jurisdiction to engage in GMA appropriate planning
10 in light of the Goals. That is particularly true when there is a threat of development vesting
11 during the time the jurisdiction is pursuing compliant legislation. *Roth et. al. v. Lewis*
12 *County*⁹², *City of Bonney Lake v. Pierce County*⁹³, and *Kittitas County Conservation v.*
13 *Kittitas County*⁹⁴. That is not the case here. While the County's action failed to meet the
14 public participation requirements, vesting is not an issue. The County took action in order to
15 comply with its understanding of Federal law, to eliminate or reduce liability for itself and its
16 permittees, and to protect a listed species and its habitat. The error can be addressed in
17 the short term. The Petitioners have failed to sustain their burden to show substantial
18 interference with Goal 11.
19

20 21 VII. ORDER

22 Based upon review of the Petition for Review, the briefs and exhibits submitted by the
23 parties, the GMA, prior Board orders and case law, having considered the arguments of the
24 parties, and having deliberated on the matter, the Board finds and concludes that the action
25 of Thurston County in implementing the Interim Screening Process resulted in *de facto*
26 amendments of the County's Critical areas Ordinance, Title 34 TCC, and:
27

- 28 1. The manner of implementation of the Interim Screening Process violated RCW
29 36.70A.035 and RCW 36.70A.140 and was clearly erroneous in view of the entire
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31 ⁹² Case No. 04-2-0014c, FDO, at 18, December 10, 2004;

32 ⁹³ Case No. 05-3-0016c, 2005 GMHB LEXIS 99, at 110 (Order Finding Compliance Con. Case 04-3-
0007c/FDO Con. Case 05-3-0016c, at 54), August 4, 2005.

⁹⁴ Case No. 11-1-0001, Corrected FDO, June 13, 2011, at 11.

record before the Board and in light of the goals and requirements of the GMA, all as set forth in this order.

2. The three proposed exhibits (proposed IR 201, 202, and 203) attached to the County's April 13, 2016 Motion to Supplement shall be stricken from the record. Furthermore, the following portions of the transcript of the Hearing on the Merits shall be stricken: 1) Page 67, lines 4 through 13; 2) Page 73, commencing at line 5, through page 74, line 12.

3. The Board sets the following schedule for the County's compliance:

Item	Date Due
Status Report on Compliance Due	August 10, 2016
Compliance Due	November 8, 2016
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	November 22, 2016
Objections to a Finding of Compliance	December 2, 2016
Response to Objections	December 12, 2016
Telephonic Compliance Hearing 1 (800) 704-9804 and use pin code 7757643#	December 20, 2016 10:30 a.m.

DATED this 12th day of May, 2016.

William Roehl, Board Member

Nina Carter, Board Member

Charles Mosher, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.⁹⁵

⁹⁵ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.

Appendix

Issues

- A. Did the County's decision to apply the 2015 Interim Process, which varies significantly from its adopted CAO, to all applications submitted to the County after June 1, 2015, constitute a *de facto* amendment to its CAO in violation of RCW 36.70A.060, 36.70A.130, and 36.70A.390?
- B. Did the County's implementation of the 2015 Interim Process without public notice or participation violate RCW 36.70A.020(11), 36.70A.035, 36.70A.106(3)(a), 36.70A.130(2), and 36.70A.140?
- C. Did the County's implementation of the 2015 Interim Process without public notice or participation violate its own Code provisions regarding Growth Management Act compliance and amendments to the CAO, TCC 2.05.030(C)-(E), 2.05.040(A), and 24.91.020?
- D. Did the County's reliance on two USFWS memos to implement the 2015 Interim Process violate the requirement that classification of designated areas be based on "best available science" and require consultation with a list of 10 interested parties, as provided for in RCW 36.70A.050, 36.70A.170, 36.70A.172, and TCC 24.91.040?
- E. Did the County's decision to halt review of permit applications for up to a 10-month period of the year to allow for the 2015 Interim Process - with applications still on hold under that process - constitute a *de facto* moratorium and an interim process without a public hearing, in violation of RCW 36.70A.370(2) and 36.70A.390, and TCC 2.05.040(A)?
- F. Did the County's implementation of the 2015 Interim Process, changing the designation of critical areas based on a memo from USFWS, constitute an improper comprehensive planning process instead of an individual project decision, in violation of RCW 36.70A.470?
- G. Did the County's implementation of the 2015 Interim Process including use of an expanded soil database wrongfully limit the capacity of land suitable for development within the County's urban growth area, in violation of RCW

A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

1 36.70A.110(2) and 36.70A.115?

2
3 H. If the challenged County action is determined to be a de facto amendment to its
4 Code, should the County's decision be voided as ultra vires because the action
5 was undertaken without benefit of required environmental review pursuant to the
6 State Environmental Policy Act, RCW 43.21C.031; and its implementing rules
7 WAC 197-11-055 (Timing of the SEPA process); WAC 197-11-060 (Content of
8 environmental review); WAC 197-11-310 (Threshold determination required);
9 WAC 197-11-315 (Environmental checklist); and WAC 197-11-330 (Threshold
10 determination process)?
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